No. 87-1835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CALIFORNIA ENERGY RESOURCES
CONSERVATION
AND DEVELOPMENT COMMISSION,

Petitioner,

vs.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JOHN S. HERRINGTON, as Secretary of
the Department of Energy of
the United States of America;
and the UNITED STATES OF AMERICA,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION AND SUMMARY

The Government's Brief in Opposition effectively demonstrates why Bonneville's authority to continue to act in its role as Northwest electric cartel master must be decided now rather than in five or ten years, after BPA's unlawful and anticompetitive policies have cost California consumers another billion dollars or more.

Bonneville does not deny that it is acting not only as a monopolist on its own behalf, but also as cartel leader for the benefit of private corporations in the Northwest. Nor does it deny that the benefits to these Northwest utilities are being paid directly by California electricity users, or that the annual cost for each year the practice is allowed to continue amounts to hundreds of millions of dollars. And the Government agrees, as it must, that unless certiorari is granted, Bonneville's authority to act in this manner will have been upheld by only one court — whose panel members disagree.

In the clearest possible language, the governing statute requires BPA to "make [the Intertie] available to all utilities on a fair and nondiscriminatory basis." Yet the Access Policy discriminates against California and Canadian utilities and creates a horizontal allocation of transmission capacity that would be a per se violation of the antitrust laws if done by private parties. Notwithstanding the clarity of the statutory mandate, the Government's Opposition makes very clear that Bonneville intends to continue to discriminate in favor of Northwest utilities and against everyone else.

The Government's explanation for Bonneville's violations is insufficient. The suggestion, based on ambiguous legislative history, that the statute's nondiscrimination mandate was intended only to assure equal treatment between public and private power companies in the Northwest is nothing less than an invitation to ignore the plain language rule and find that Congress meant "some utilities" when it said "all utilities." And the observation that this Court has never held that proprietary governmental agencies, as opposed to regulatory bodies,

must take the antitrust laws into account in formulating their policies is a reason to grant certiorari, not to deny it.

Finally, the suggestion that things may change and that this Court should delay review of the issue for several more years must be rejected. BPA does not and cannot deny that the same unlawful and anticompetitive features of the Near-Term Policy are also present in the Long-Term Policy. The new policy continues to prefer Northwest utilities over California and Canadian utilities, to the large economic detriment of California consumers. The new policy also continues the pro rata allocation scheme during a substantial portion of the year, thus shielding Northwest non-governmental entities from price competition. The "experiment" described in footnotes 3 and 6 of the Brief in Opposition does not change these facts.

I. BPA HAS FAILED TO COMPLY WITH THE PLAIN LANGUAGE OF ITS GOVERNING STATUTES

Although the language of the Congressional directive to make excess Intertie capacity available "to all utilities on a fair and nondiscriminatory basis" could not be plainer, the Government asks this Court to defer to an interpretation that would permit BPA to make the Intertie available to some utilities, while discriminating against others. BPA seeks this deference based not on legislative history that clearly shows that Congress did not mean what it said, but rather on ambiguous legislative history that itself must be interpreted in order to support BPA's revision of the statute.[1]

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[1] BPA tries to bolster this weak rationale by arguing that Congress has been aware of BPA's Exportable Agreement for many years and has not taken action to correct any unlawful features. Opp. at 15-16. This argument is answered by this Court's statement that "we walk

First, BPA focusses on the use of the word "may" in the legislative history of the 1964 Act (16 U.S.C. §837e) and argues that since Congress did not use the word "must" in discussing BPA's duty to wheel Canadian non-treaty energy, BPA is entitled to ignore the use of the word "shall" in the statute itself. Opp. at 15. But it would have made no sense for Congress to use the word "must" in explaining BPA's obligations regarding non-treaty Canadian energy (or any other nonfederal energy). BPA is obligated to provide wheeling for *anyone* only if there is excess Intertie capacity after the needs of federal and Canadian treaty energy have been met. In all likelihood, Congress used the word "may" because it was uncertain if there would be excess capacity available to carry other energy, not because it intended to repudiate the statement, in the same sentence, that Canadian non-treaty energy "stands on the same basis as any other nonfederal energy." See also Pet. at 19-21.

Second, BPA argues that the House Report for the 1974 Act (16 U.S.C. §838d) "shows that the *sole* purpose

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on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940); *see Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241-42 (1970). In addition, there was no need for Congress to act since, until adoption of the Access Policy, all energy sold under the Exportable Agreement was sold at a low market clearing rate. Pet. at 8-9 nn. 8 & 10.

Similarly, Congress's recent declarations, in legislation dealing with proposed upgrades to the Pacific Intertie and with the question of public preference in hydro relicensing, of its intent not to "modify, change, or expand" BPA's authority to administer its transmission lines, do not amount to Congressional approval of the Access Policy or the *LADWP* opinion. Such disclaimers of intent to act in one area when dealing in related but different areas are part of the process whereby Congress *avoids* controversial side issues so that agreement on the subject at hand can be reached. Such disclaimers certainly cannot fairly be argued to amount to revisitation by Congress of statutes it has expressly decided not to revisit. See Opp. at 13-14, n. 9.

of Section 838d was to make clear BPA's obligation to treat publicly owned and investor-owned utilities alike in granting access to its transmission system." Opp. at 17 (emphasis added). The House Report does indeed show that this was *a* purpose, but does not say that this was the *sole* purpose of the language. If this had been the only purpose, Congress could have accomplished its intent more directly with narrower language simply prohibiting discrimination between publicly and investor-owned utilities.[2]

BPA's reliance on ambiguous legislative history in attempting to change the plain meaning of a statute commanding nondiscriminatory treatment of *all* utilities violates the rule that resort to legislative history is only appropriate where the words of the statute leave doubt about Congress's intent. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances."). As the Court recently explained in *Amoco Production Co. v. Village of Gambell, Alaska*, ___ U.S. ___, ___, 107 S.Ct. 1396, 1406 (1987):

> Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning. "[D]eference to

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[2] The Senate Report for the 1974 Act (quoted in the Petition at 22 n.22) also shows that the Government's position is untenable. The Senate Report says that "Section 6 [16 U.S.C. §838d] provides that the Administrator of the Bonneville Power Administration shall not discriminate among classes of customers in making agreements to transmit electric power over Federal transmission lines." Utilities inside and outside the Northwest are two classes of transmission customers, yet BPA actively discriminates between them in violation of Congress's command.

> the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' "

In this case, the word "all" does have a precise meaning, and there is no clear indication that Congress really meant "some."[3]

II. CERTIORARI SHOULD BE GRANTED TO ESTABLISH THAT BPA, AS A PROPRIETARY GOVERNMENT AGENCY, HAS A DUTY TO CONFORM ITS POLICIES TO THE ANTITRUST LAWS TO THE MAXIMUM EXTENT FEASIBLE

In justification of its cartel, BPA does not seriously dispute that its pro rata allocation scheme would violate the antitrust laws if BPA were a private party. Instead, BPA argues (1) that its duty as a proprietary agency to harmonize its policies with the antitrust laws may be less than the duty of a regulatory agency to do so (Opp. at 19-20 n.16), and (2) that, in any event, it has fulfilled its duty because *Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747 (1973), and related cases (Pet. at 24), require only "balancing" of the antitrust laws rather than an effort to comply with them. Opp. at 20-22. Neither argument has merit.

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[3] Accordingly, the Government's argument that giving section 838d its plain meaning would constitute "a roving mandate for courts to require 'equal' treatment of any two utilities that a court might regard as similarly situated" (Opp. at 17) is particularly flawed. Judicial review *is* a mandate, not roving at all, for courts to require agencies to follow the plain language of Congressional enactments rather than allowing agencies to substitute their own policy preferences under the guise of interpretation.

In the *Gulf States* line of cases, the courts have firmly held that federal agencies, as creatures of Congressional action, may not make policy that tramples the important policies in the antitrust laws without demonstrating that other Congressional policies justify the anticompetitive results. That federal agencies have been held not subject to liability under the antitrust laws is not a license to violate those laws with impunity. And the fact that the courts have thus far directly addressed only the duty of regulatory agencies demonstrates the need for resolution of this important question.

If anything, federal proprietary agencies — which act as market players and not as regulatory overseers — should receive even *more* careful supervision by the courts than do regulatory agencies, in order to insure that the will of Congress, as expressed in the antitrust laws, is not subordinated to policies of far less import. The temptation of the human decisionmakers who control federal proprietary agencies to take advantage of market power to the detriment of consumers is no different than the temptation felt by the human officials who run private corporations. While it might be reasonable to assume that federal *regulatory* agencies would not be influenced by such temptations, given their role as market overseers rather than market players, even those agencies must provide a reasoned justification for any anticompetitive action. It makes no sense for a proprietary agency to have a lesser obligation.

BPA is not correct in arguing that the courts must closely scrutinize anticompetitive agency action only where the agency has "summarily disposed" of antitrust concerns or "failed to consider such concerns at all." Opp. at 20. The case law does not say this.[4] Moreover,

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[4] In *Gulf States* this Court did indicate that close scrutiny was required where the agency had summarily disposed of antitrust concerns, but the Court did not, as the Government implies, indicate

whether federal agencies are said to have a duty to "balance" antitrust principles against other statutory commands or to comply with them "to the maximum extent feasible," in either case the agency must justify why the policies of *Congress* require anticompetitive conduct.[5] BPA has not done this.

Petitioners do not, as the Government's Brief suggests, argue that BPA has a blind duty to comply with antitrust principles "at the expense of all other considerations." Opp. at 21. We do contend, however, that BPA must do more than merely list the anticompetitive impacts of its decision and declare that competitive factors have been "balanced." That is all that BPA has done in this case.[6] If

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that this was the *only* circumstance in which the courts need to hold agencies to a duty to harmonize their policies with antitrust principles. Subsequent courts have found no such directive in *Gulf States*. *See Maryland People's Counsel v. FERC*, 761 F.2d 780, 788-89 (D.C. Cir. 1985); *City of Huntingburg v. Federal Power Comm'n*, 498 F.2d 778 (D.C. Cir. 1974).

[5] As we point out in the petition (at 28-29), agencies have been held accountable for considering, on their own initiative, alternatives that would carry out their legitimate objectives in a less anticompetitive fashion. Thus the duty involved is more than passive "consideration" of competitive impacts. It requires compliance where that is feasible and a justification, related to the statutory mandate of the agency, where compliance is not feasible.

[6] BPA's repeated references to its duty to recover sufficient revenues to repay its debt to the Federal treasury do not justify the Access Policy. As long as BPA continues to throw away tens or hundreds of millions of dollars a year in potential revenue by relinquishing to Northwest utilities a substantial part of the Intertie that Congress reserved for federal energy, BPA's need to restrict competition, even with its own sales, is in doubt. Moreover, the Government's only attempt to relate the restriction of competition among *nonfederal* sellers to BPA's revenue needs is an argument first advanced in the record for the Long Term Intertie Access Policy. Opp. at 24 n.18. That argument is that if BPA can make hundreds of millions of dollars for Northwest nonfederal utilities (out of the pockets of California ratepayers) through a cartel device, a few

BPA had no affirmative duty to choose policy alternatives, where they are available, that are more consistent with antitrust policy yet just as protective of the agency's other mandates, then the duty to consider competitive impacts would mean nothing.[7]

III. THE "EXPERIMENT" PROPOSED IN THE LONG TERM INTERTIE ACCESS POLICY DOES NOT MAKE THIS CASE MOOT

The Government asserts that the May 17, 1988 adoption of a Long Term Intertie Access Policy (LTIAP) makes this challenge to BPA's Access Policy moot "in most respects." Opp. at 10-11. The Government suggests that because the LTIAP has made some minor modifications to the pro rata allocation scheme, we should now proceed through another Ninth Circuit review in which that court will again assume that BPA has the power to discriminate against utilities outside the Northwest. For several reasons, such a delay, which would allow BPA and other Northwest utilities to extract monopoly prices from California consumers for several more years, is entirely unwarranted.

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million will flow indirectly to BPA through its business dealings with those parties. A weaker justification for anticompetitive conduct by a federal agency would be hard to imagine.

[7] The Government apparently takes the position that BPA is justified in disregarding the antitrust laws because of BPA's perception that such a violation is necessary to counteract anticompetitive activity by California utilities. This argument falls short for three reasons. First, there is nothing in the record of this case to indicate any anticompetitive activity by anyone other than BPA. Pet. at 28. Second, as noted in the Petition, retaliatory anticompetitive conduct is not condoned by the antitrust laws. Pet. at 27-28. Finally, and most important, BPA is unable to cite any Congressional act or policy that requires or authorizes the creation of a cartel to benefit Northwest utilities at the expense of California consumers.

First, the Government admits that the "LTIAP maintains the distinction between Northwest utilities and extraregional utilities" (Opp. at 11, n. 6) so that the principal issue in this case — BPA's power to discriminate against some utilities — is not affected at all by the LTIAP. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 123-24, n. 19 (D.C. Cir. 1980); *Dow Chemical Co. v. E.P.A.*, 605 F. 2d 673, 678-80 (3d Cir. 1979). Second, the LTIAP "experiment," by BPA's admission (Opp. at 10 n.6), applies only to Conditions 2 and 3 and not to Condition 1. Yet Condition 1 (which, under the Exportable Agreement, has been implemented during spill or imminent spill in the Northwest) has historically been the time of the year when the most surplus energy was available for sale to California.[8] Condition 1 is the time when competition among sellers should be at its greatest, yet BPA has decided to continue eliminating competition among sellers during this important period.[9]

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[8] BPA's Intertie records show that during 1985 and 1986, 40 percent of the energy sent to California was transmitted at times when BPA declared Condition 1. Conditions 2 and 3 accounted for 37.5 percent and 22.5 percent respectively.

[9] There are other reasons, as well, why the "experiment" is not likely to represent a significant change from the Near Term Policy. First, the LTIAP defines Condition 1 in a way that allows BPA to expand greatly the occurrence of Condition 1 and thus reduce the incidence of Condition 2. The new definition of Condition 1 is "spill or likelihood of spill" rather than "spill or imminent spill" which has been BPA's historic practice. LTIAP §5(c)(1)(B). In informal workshops, BPA operators have admitted that they read this new language to permit them to declare Condition 1 months before spill actually occurs, based on existing water levels and historic probabilites that spill will likely occur at some point in the future.

Significant reduction in the incidence of Condition 2 would mean that the "experiment," which is supposed to permit competition among nonfederal sellers under Conditions 2 and 3, would have even less effect than one might predict by looking at historic Intertie records. Indeed, the "experiment" might have very little effect on the

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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interests of California ratepayers because competition among sellers tends only to occur naturally under Conditions 1 and 2 when there is enough surplus energy to fill the Intertie. During Condition 3, there is already a natural seller's market even without the Policy. The experiment therefore changes nothing under Condition 3.